Court File No. CV-17-588051-OOCL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

BETWEEN

FIRSTONTARIO CREDIT UNION LIMITED

Applicant

-and-

FERWIN VENTURES CAPITAL INC.

Respondent

FACTUM AND BOOK OF AUTHORITIES OF ANTONIO DI DOMIZIO AND MALGORZATA DI DOMIZIO

TO BE HEARD APRIL 17, 2018

Murray N. Maltz
Murray Maltz Professional Corporation
Barrister and Solicitor
933 Mount Pleasant Road
Toronto, Ontario M4P 2L7
Tel: 416-398-6900
Fax: 416-398-6845
lawmaltz@on.aibn.com
Solicitor for Antonio Di Domizio
and Malgorzata Di Domizio
LSUC #25047R

To: David J. Jackson
SimpsonWigle Law LLP
1 Hunter Street East, Suite 200
Hamilton, Ontario L8N 3W2
Tel: 905-528-8411
Fax: 905-528-9008
Solicitor of the Receiver, msi Spergel Inc.

Howard Manis
MacDonald Sager Manis LLP
150 York Street, Suite 800
Toronto, Ontario M5H 3S5
Tel: 416-364-5289
Fax: 416-364-1453

hmanis@msmlaw.ca
Solicitor for Ferwin Ventures Capital Inc., Debtor
and Sting Incorporated, Second Mortgagee

Mark P. Nazarewich
The Corporation of the City of Windsor
400 City Hall Square East
Windsor, Ontario N9A 7K6
Tel: 519-255-6100 x 6427
Fax: 519-255-6933
mnazarewich@citywindsor.ca

Jack Berkow
Berkow Youd Lev-Farrell Das LLP
141 Adelaide Street West, Suite 400
Toronto, Ontario M5H 3L5
Tel: 416-364-4900
jberkow@byldlaw.com
Solicitor for Leo Agozzino

Davide Petretta
Volturara Investments Inc.
2504 Binder Crescent
Oldcastle, Ontario N0R 1L0
Tel: 519-737-1292
info@petcon.net
Mortgagee

Italo Ferrari
29 Knudson Lane
Woodbridge, Ontario L4L 3A6
italo@wilsondale.ca

Diane Winters
Peter Zevenhuizen
Canada Revenue Agency
c/o Department of Justice
The Exchange Tower
130 King Street West, Suite 3400
Toronto, Ontario M5X 1K6
Tel: 416-973-3172
Fax: 416-973-0810
Diane.Winters@justice.gc.ca
Peter.Zevenhuizen@justice.gc.ca

Kevin J. O'Hara
Her Majesty the Queen in Right of the Province of Ontario as represented by The Ministry of Finance
33 King Street West, 6th Floor
Oshawa, Ontario L1H 1A1
Tel: 905-433-6934
Fax: 905-436-4510
Kevin.Ohara@ontario.ca

Jordana Stockhamer
Halpern Stockhamer
7500 Woodbine Avenue, Suite 300
Markham, Ontario L3R 1A8
Tel: 905-474-3300
Fax: 905-474-3305
Solicitor for Potential Purchaser

Court File No. CV-17-588051-OOCL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

BETWEEN

FIRSTONTARIO CREDIT UNION LIMITED

Applicant

-and-

FERWIN VENTURES CAPITAL INC.

Respondent

INDEX

Court File No. CV-17-588051-OOCL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

BETWEEN

FIRSTONTARIO CREDIT UNION LIMITED

Applicant

-and-

FERWIN VENTURES CAPITAL INC.

Respondent

FACUM OF

ANTONIO DI DOMIZIO AND MALGORZATA DI DOMIZIO

PART I – THE FACTS

1. Malgorzata Di Domizio and Antonio Di Domizio (hereinafter referred to as "Di Domizio) lent to Ferwin Ventures Capital Inc. (hereinafter referred to as "Ferwin") the sum of $550,000.00. Di Domizio was provided as security a mortgage registered on the 9th of May 2017 as instrument number CE770259 to secure the debt. The mortgage was registered on a property known as 785 Goyeau Street, Windsor, Ontario (hereinafter referred to as "785 Goyeau").

Reference: Paragraph 1 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

Reference: Exhibit A of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1A of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

2. The loan was for the sum of $550,000.00 and Di Domizio advanced the sum of $500,000.00 by way of bank draft to Wilsondale Assets Management Inc. dated the 24th of April 2017.

Reference: Paragraph 3 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

Reference: Exhibit B of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1B of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

3. The cheque was advanced to Wilsondale Assets Management Inc. pursuant to a Direction Re-Funds, as requested by the lawyer acting on the preparation and registration of the mortgage.

Reference: Paragraph 4 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

Reference: Exhibit C of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1C of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

4. The advance was $500,000.00 as there was a commitment fee of $50,000.00, which was deducted from the advance.

Reference: Paragraph 5 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

5. Di Domizio is an acquaintance of Italo Ferrari (hereinafter referred to as "Italo") but has no business dealings with him other than Di Domizio lending him money pursuant to this transaction.

Reference: Paragraph 6 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

6. Di Domizio permitted Italo's lawyer to prepare the mortgage and act on behalf of both Di Domizio and Ferwin. Di Domizio assumed that he in fact would prepare the correct documents. Di Domizio has reviewed the mortgage and all terms are correct other than

the fact that they have made Di Domizio's address for service the same as Ferwin which is wrong as it should be their home.

Reference: Paragraph 7 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

7. Pursuant to the report of the Receiver dated the 6th of April 2018, Italo is the sole director and officer of Ferwin, as well as Wilsondale Assets Management Inc. A Special Resolution of the Sole Director and Sole Shareholder permits Ferwin to enter into the mortgage with Di Domizio.

Reference: Paragraph 8 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

Reference: Exhibit D and E of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1D and Tab 1E of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

Reference: First Receiver Report dated April 6, 2018.

8. Di Domizio was later given additional security by way of a fourth mortgage on a property known as 731 Goyeau Street, Windsor Ontario (hereinafter referred to as "731 Goyeau") on the 13th of July 2017 referencing the mortgage as further collateral to 785 Goyeau. No additional money was advanced. Di Domizio believes that no money will be realized from the sale of 731 Goyeau if sold by way of a third party action as the three mortgages registered on title exceed the value of the property.

Reference: Paragraph 10 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

9. Pursuant to the terms of the mortgage, principal and interest was due on the 3rd of November 2017 and no money was received. A discharge statement dated April 2018 shows Di Domizio is owed the sum of $626,312.48.

Reference: Paragraph 11 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

Reference: Exhibit F of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1F of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

10. The Receiver wishes to sell 785 Goyeau for the sum of $850,000.00. The first mortgage in favour of Volturara Investments Inc. as of March 2018 is owed the sum of $415,205.91 as found at Tab 15 of the Applicant's Motion Record. The commission on the sale is 2% or a total of $17,000.00 plus HST of $2,210.00, City of Windsor tax arrears are the sum of $8,457.85 and CRA is owed the sum of $16,966.79. The fees to the Receiver is the sum of $4,426.00 and legal fees of $5,544.03, as well as the Receiver wanting to hold back the sum of $30,000.00 therefore Di Domizio will receive the sum of $350,189.42 of their loan creating a substantial loss, which Di Domizio is not willing to accept at this time.

Reference: Paragraph 12 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

Reference: Tab 15 of the Applicant's Motion Record returnable April 17, 2018.

11. Mr. Di Domizio is 83 years of age and cannot afford to accept this loss. It is Di Domizio's belief that they will receive no further funds associated with the debt of Ferwin despite the fact that the Receiver wishes to investigate the matter more with Di Domizio's secured money.

Reference: Paragraph 13 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

12. Di Domizio is not agreeable to the distribution proposed by the Applicant or the hold back of $30,000.00 to be used by the Receiver for him to investigate Ferwin and not to preserve the property.

Reference: Paragraph 14 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

13. Di Domizio is advised that the first mortgagee does not wish to sell the property nor does Di Domizio. Di Domizio believes that the property is being sold for less money than it is worth and in a down market. If left alone it will increase in value and Di Domizio will get all of their money back.

Reference: Paragraph 15 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

14. As the unsecured creditors receive no money from the sale there is no benefit to sell the property as only the secured creditors will receive funds.

Reference: Paragraph 16 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

15. At no time did Di Domizio give the Receiver the authority to preserve or sell 731 Goyeau. In fact when Di Domizio found out about the actions of the Receiver they advised them that there was no benefit to their actions and Di Domizio did not want the property sold.

Reference: Paragraph 17 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

Reference: Exhibit G of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1G of the Reply Motion Record of Antonio Di Domizio and Malgorzata Di Domizio.

16. 731 Goyeau is a parking lot in the downtown core of Windsor.

Reference: Paragraph 18 of the Affidavit of Antonio Di Domizio sworn the 11th of April 2018 found at Tab 1 of the Reply Motion Record of Antonio Di Domizio.

17. The solicitor for the Receiver, SimpsonWigle, has confirmed the validity of the second mortgage in favour of Di Domizio to be enforceable in accordance with their terms.

Reference: Appendix 17 of the first report of the Receiver dated the 6th of April 2018.

PART II - THE LAW

1. In ***Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.***, (1976), 9 O.R. (2d) 84, 1975 CanLII 681 (ON CA), Ontario Court of Appeal, Jessup, Lacourciere and Houlden, JJ .A., the court states:

By notice of motion dated December 9, 1974, the receiver applied to the Court for an order discharging him as receiver. In addition, he asked for an order granting him priority over the appellant's charge for his remuneration and legal costs and for expenditures made, and obligations incurred, by him. The appellant received notice of this application. On December 13, 1974, Holland, J., made an order discharging the receiver and granting him priority over the appellant's charge for the mortgage payment of $24,043.26. It is the order granting priority to the receiver over the appellant's charge which is attacked in this appeal.

Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark On Receivers, 3rd

ed., by Ralph Ewing Clark of the Cincinnati Bar, vol. 2, s. 638, pp. 1070-1, sums up the position regarding general receivers (a general receiver being "a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": Clark, op. cit., vol. 1, s. 22, p. 25, in this way:

When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.

2. ***Business Corporations Act, R.S.O. 1990, c. B. 16.***

Corporate power

17 (1) It is not necessary for a by-law to be passed in order to confer any particular power on the corporation or its directors. R.S.O. 1990, c. B.16, s. 17 (1).

Power limited by articles, etc.

(2) A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles. R.S.O. 1990, c. B.16, s. 17 (2).

Acting outside powers

(3) Despite subsection (2) and subsection 3 (2), no act of a corporation including a transfer of property to or by the corporation is invalid by reason only that the act is contrary to its articles, by-laws, a unanimous shareholder agreement or this Act. R.S.O. 1990, c. B.16, s. 17 (3).

Where notice is not deemed

18 No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed with the Director or is available for inspection at an office of the corporation. R.S.O. 1990, c. B.16, s. 18.

Indoor management rule

19 A corporation or a guarantor of an obligation of a corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that,

(a) the articles, by-laws or any unanimous shareholder agreement have not been complied with;

(b) the persons named in the most recent notice filed under the *Corporations Information Act*, or named in the articles, whichever is more current, are not the directors of the corporation;

(c) the location named in the most recent notice filed under the *Corporations Information Act* or named in the articles, whichever is more current, is not the registered office of the corporation;

(d) a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or does not have authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent;

(e) a document issued by any director, officer or agent of a corporation with actual or usual authority to issue the document is not valid or not genuine; or

(f) a sale, lease or exchange of property referred to in subsection 184 (3) was not authorized,

except where the person has or ought to have, by virtue of the person's position with or relationship to the corporation, knowledge to that effect. R.S.O. 1990, c. B.16, s. 19; 2006, c. 34, Sched. B, s. 3; 2011, c. 1, Sched. 2, s. 1 (4).

PART III – THE ARGUMENT

1. The Applicant's debt to Ferwin was secured by a mortgage on a property known as 720 Quellette Avenue Windsor Ontario. The mortgage went into default and the Applicant, as opposed to bring a simple Notice of Power of Sale to sell the property and Statement of Claim for any deficiencies, chose to take a more expensive legal avenue of appointing a Receiver to dispose of the property.

2. They also chose to take the route without notice to the first and second mortgagees on the property known as 785 Goyeau to sell the property despite the property being secured by a first and second mortgage and the Applicant receiving no money from the sale. In fact, the actions of the Receiver will create a shortfall for the second mortgagee of 785 Goyeau. The Applicant's obtained an appraisal that advised them that they would not realize any funds from the sale of the 785 Goyeau but for some reason chose to proceed.

3. The action of the Receiver is in fact an exercise in futility and simply is a make-work program for both the Receiver and their legal representative.

4. The Receiver wishes to recover fees from the secured second mortgagee being the following fees: Receiver $4,426.00, legal fees of Simpson Wigle of $5,544.03, as well as pay off real property taxes of $8,457.85 and CRA of $16,966.79, real estate commissions of $19,210.00 and hold back of $30,000.00 for some ill-founded desire to further investigate the matter, being a total of $84,604.67. This is money is the secured second mortgage and their actions deprive the second mortgagee of their money.

5. All evidence clearly shows a good and valid registered mortgage in favour of the second mortgagee and that Malgorzata Di Domizio and Antonio Di Domizio advanced good and valid consideration to Ferwin.

6. All evidence shows that the signor of the mortgage documents had authority to enter into the second mortgage and borrow funds in accordance with the terms of the Business Corporations Act, R.S.O. 1990, c. B.16 and that he entered into the mortgage in accordance with the authority of Ferwin. More-so the Receiver has confirmed that the signor of the mortgage, Italo Ferrari, is in fact the sole director and shareholder of Ferwin Ventures Capital Inc., as well as the fact that it is a mortgage which is enforceable by Mr. and Mrs. Di Domizio.

PART IV - RELIEF REQUESTED

1. The motion of the Applicant be dismissed.

2. In the alternative that the funds associated with the sale of 785 Goyeau Street be disbursed as follows:
   (i) the corporation of the City of Windsor on account of municipal property taxes;
   (ii) Canada Revenue Agency on account of outstanding HST;
   (iii) Volturara Investments Inc. on account of its mortgage loan to the Debtor to a maximum of $415,205.91 plus interest from or about March 2018; and
   (iv) the balance of the funds payable to Malgorzata Di Domizio and Antonio Di Domizio.

3. The Applicant pay costs of Antonio and Malgorzata Di Domizio fixed and payable forthwith.

4. Such further order as this Honourable court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED: April 11, 2018

Murray N. Maltz
Murray Maltz Professional Corporation
Barrister and Solicitor
933 Mount Pleasant road
Toronto, Ontario M4P 2L7
Tel: 416-398-6900
Fax: 416-398-6845
Solicitor for Antonio Di Domizio
and Malgorzata Di Domizio
LSUC # 25047R

Robert F. Kowal Investments
Ltd. et al. v. Deeder Electric Ltd.

(1976), 9 O.R. (2d) 84

ONTARIO
COURT OF APPEAL
JESSUP, LACOURCIERE
and HOULDEN, JJ.A.
5TH MAY 1975

Debtor and creditor -- Receivers -- Expenses -- Receiver incurring expenses to pay sums due to mortgagee -- Whether receiver has priority over mortgagee.

A receiver has, in general, no priority for his expenses over a prior secured creditor unless the receiver is appointed with the consent of the secured creditor or for his benefit, or unless the expenses are necessary for the protection of the property for the benefit of all creditors including the secured creditor. Thus, where a receiver of the assets of a partnership borrows money to pay sums owing to a prior mortgagee of the assets, he has no priority over the mortgagee. Such payments are made not for the benefit of the mortgagee but to protect the assets for the benefit of the other creditors and the partners. If the receiver were to be given priority the mortgagee would, in many cases, receive little or no benefit from the payments made.

[Boehm v. Goodall, [1911] 1 Ch. 155, apld; Strapp v. Bull, Sons & Co.; Shaw v. School Board of London, [1895] 2 Ch. 1; Braid Builders Supply & Fuel Ltd. et al. v. Genevieve Mortgage Corp. Ltd. (1972), 29 D.L.R. (3d) 373 17 C.B.R. (N.S.) 305; Re Oriental Hotels Co.; Perry v. Oriental Hotels Co. (1871), L.R. 12 Eq. 126, distd; Re Regent's Canal Ironworks Co., Ex p.

Grissell (1875), 3 Ch. D. 411, refd to]

APPEAL from a judgment of Holland, J., granting priority to a receiver for certain expenses over a mortgagee.

H. Lorne Morphy and Sheila R. Block, for appellant, Monte Denaburg.

John G. Reid, Q.C., for plaintiffs, respondents.

Leon Klug, for receiver, respondent, Jerry Friedman.

The judgment of the Court was delivered by

HOULDEN, J.A.:-- This is an appeal from an order of the Honourable Mr. Justice Holland dated December 13, 1974, which declared that Jerry Friedman was entitled, on his discharge as receiver, to priority for $24,043.26 over a land titles charge held by the appellant, the sum of $24,043.26 being the total of payments of principal and interest made by the receiver to the appellant on his charge during the period of the receivership.

On November 30, 1971, a charge under the Land Titles Act, R.S.O. 1970, c. 234, was given on the property municipally known at 2010 Jane St. in the Borough of North York. The charge was in the principal sum of $400,000. It was registered in the Office of Land Titles at Toronto on December 1, 1971, as instrument No. B-306317. By transfer of charge dated December 31, 1971, and registered in the Office of Land Titles at Toronto on January 17, 1972, as instrument No. B-310301, the charge was transferred to the appellant Monte Denaburg.

In February, 1972, the premises at 2010 Jane St. were purchased by Robert F. Kowal Investments Limited, Randy Construction Company Limited and Deeder Electric Limited in partnership. On the property, there was located a car wash. At the time of the purchase, the three limited companies entered into a partnership agreement with respect to the operation of

the car wash.

In January, 1974, serious differences arose between the partners concerning the management of the business. On January 17, 1974, the defendant Deeder Electric Limited gave notice to the plaintiffs of its desire to terminate the partnership. On February 7, 1974, the plaintiffs issued a writ against Deeder Electric Limited claiming, inter alia, the dissolution of the partnership, the appointment of a receiver and an accounting.

By a consent judgment dated March 13, 1974, the Honourable Mr. Justice Wright made an order dissolving the partnership and appointing Jerry Friedman as receiver of the partnership affairs. Prior to accepting the appointment, Friedman obtained from the plaintiffs an agreement to be responsible for his fees, costs, charges and expenses in acting as receiver in so far as he was unable to recover them from the assets of the partnership.

On May 9, 1974, the Honourable Mr. Justice Goodman made a consent order varying the judgment of March 13, 1974. Paragraph 13 of the order of May 9, 1974, provided:

> 13. AND THIS COURT DOTH FURTHER ORDER that the said receiver and manager be at liberty and he is hereby empowered to borrow monies from time to time as he may consider necessary, not exceeding the principal amount of Twenty-Five Thousand Dollars ($25,000.00), including money already expended, at an interest rate not to exceed prime plus 3 per cent, for the purpose of protecting and preserving and selling the undertaking, property and assets of the partnership and carrying on the business and undertaking of the said partnership and for the purposes of paying presently existing mortgage payments as they fall due, and that as security therefor and for every part thereof, the whole of the undertaking, property and assets of the partnership together with all assets and property which may hereafter be in the custody and control of the receiver and manager as such, do stand charged with the payment of the monies so borrowed by the receiver and manager.

Although para. 13 referred to the "receiver and manager", the original judgment and the amending order appointed Friedman as receiver only of the partnership assets. Pursuant to the authority given by para. 13, the receiver borrowed $25,000.

The appellant was not served with notice of any of the foregoing proceedings in the partnership action. However, there is no doubt that shortly after March 13, 1974, the appellant was aware of the appointment of the receiver. From March to September, 1974, the appellant received payments on his charge from the receiver in the total amount of $24,043.26.

By notice of motion dated October 18, 1974, the receiver applied to the Court for permission to borrow a further $15,000 on the same terms as in para. 13 of the order of May 9, 1974, and for an order that the sum so borrowed and the $25,000 already borrowed, should be a first charge on the whole of the undertaking, property and assets of the partnership in priority to the appellant's charge. The appellant was served with notice of this application. On October 24, 1974, Holland, J., dismissed the application without written reasons.

By notice of motion dated December 9, 1974, the receiver applied to the Court for an order discharging him as receiver. In addition, he asked for an order granting him priority over the appellant's charge for his remuneration and legal costs and for expenditures made, and obligations incurred, by him. The appellant received notice of this application. On December 13, 1974, Holland, J., made an order discharging the receiver and granting him priority over the appellant's charge for the mortgage payment of $24,043.26. It is the order granting priority to the receiver over the appellant's charge which is attacked in this appeal.

The mortgage payments made by the receiver to the appellant were proper payments for the receiver to have made. If they had not been made, the appellant would likely have taken steps to enforce his security and if this had occurred, the potential recovery of the partners and the unsecured creditors could have been seriously affected. The receiver was, therefore, clearly entitled to priority over the claims of the partners and the

unsecured creditors for the moneys he had borrowed to make the payments on the appellant's charge. However, the issue that we are called on to decide is whether the receiver should receive priority over the secured claim of the appellant for the borrowed moneys.

The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. In Boehm v. Goodall, [1911] 1 Ch. 155, a receiver and payments which the assets of the firm were insufficient to satisfy in full; he brought an application for an order that the partners should personally indemnify him for the balance owing to him. In dismissing the application, Warrington, J., said (at p. 161):

> I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control.

Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark On Receivers, 3rd ed., by Ralph Ewing Clark of the Cincinnati Bar, vol. 2, s. 638, pp. 1070-1, sums up the position regarding general receivers (a general receiver being "a receiver who takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": Clark, op. cit., vol. 1, s. 22, p. 25, in

this way:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.

There are certain exceptions to the general rule. (I do not propose to give an exhaustive list of such exceptions but to refer only to the exceptions which, in my opinion, have some relevance for the facts of this case.) The first exception is this: If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. One would ordinarily expect that in these circumstances the order permitting the receiver to borrow would clearly provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to, or approved of, his appointment, the receiver will have priority for charges and expenses properly incurred by him.

The priority which is given to a receiver in this type of situation is illustrated by Strapp v. Bull, Sons & Co.; Shaw v. School Board of London, [1895] 2 Ch. 1. In that case, a building company became involved in serious financial

difficulties. Receivers and managers were appointed at the request of debenture holders of the company. The receivers and managers obtained permission to borrow 5,000 pounds by way of a first charge in priority to the security of the debenture holders. Certain proceedings were then taken by unsecured creditors as a result of which an agreement was made whereby unsecured creditors agreed to advance two-thirds and the plaintiff Strapp, who was a debenture holder, agreed to advance one-third of the moneys that the receivers and managers wished to borrow. In due course, the receivers and managers borrowed 1,750 pounds from Strapp and 2,500 pounds from the unsecured creditors. The receivership worked out badly, and in completing certain contracts, the receivers and managers used up all the moneys they had borrowed and, in addition, incurred substantial further indebtedness. The receivers and managers applied for an order that they were entitled to priority for the debts they had incurred not only over the security of the debenture holders, but also over the security held by Strapp and the unsecured creditors for the 4,250 pounds that the receivers and managers had borrowed. This application was dismissed by Vaughan Williams, J., but on appeal, his decision was reversed and the receivers and managers were granted the priority they had requested. With reference to the position of the persons who had advanced the 4,250 pounds, A.L. Smith, L.J., said (at p. 11):

> Under these circumstances it seems to me that these people who have advanced the money stand in the same position as second debenture-holders. They have acquiesced in this form of carrying on the business by their receivers and managers, and I think, therefore, the law as laid down by Pearson J. and the Master of the Rolls, Sir George Jessel, in the two cases to which I have referred, applies, and consequently they [the receivers and managers] are are entitled to be paid their charges.

However, the exception to the general rule enunciated in Strapp v. Bull has no application to this case. Here, there was no acquiescence by the appellant in the appointment of the receiver. As has been pointed out, the appellant was given notice of the proceedings which led to the appointment of Jerry

Friedman as receiver. It was not until after the indebtedness was incurred that the receiver sought an order giving him priority over the appellant's charge. The first exception to the general rule has, therefore, no application to the facts of this case.

The second exception is this: If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact (as was attempted in the present case), that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors: Greenwood v. Algesiras (Gibraltar) R. Co., [1894] 2 Ch. 205. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured creditors whose rights will be affected: Greenwood v. Algesiras (Gibraltar) R. Co.; and it will require compelling and urgent reasons for the Court to grant its approval if the secured creditors oppose the making of the order: Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. The Company, [1912] W.N. 66.

The appointment of a receiver in these circumstances is illustrated by Braid Builders Supply & Fuel Ltd. et al. v. Genevieve Mortgage Corp. Ltd. (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305. In that case, a receiver was appointed of all the undertaking, property and assets of a building company which was in the course of construction of an apartment block. There was a first mortgage on the premises of $1,100,000. Unfortunately, the sale of the building by the receiver did not realize sufficient to pay the first mortgage in full. While admitting that certain disbursements of the receiver were in order and entitled to be paid in priority to its mortgage, the first mortgagee claimed that the balance of the disbursements and the fees of the receiver should not be given priority over the mortgage.

Although the judgment makes no mention of whether or not the

first mortgagee was served with the motion to appoint the receiver, it would seem that service must have been made on the mortgagee, since Dickson, J.A. (as he then was), who delivered the judgment of the Manitoba Court of Appeal, pointed out that the first mortgagee did not appeal the order appointing the receiver. The report does not indicate, either, whether the secured creditor consented to or approved of the appointment of the receiver. The Court of Appeal for Manitoba held that, the appointment having been made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property, the receiver should be given priority for all his fees and disbursements over the secured creditor. Dickson, J.A., said (at pp. 375-6):

> The Court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property?

The second exception to the general rule likewise has no application to the facts of this case. Paragraph 13 of the order of Goodman, J., of May 9, 1974, supra, created a charge on the whole of the undertaking, property and assets of the partnership. This could have referred only to the equity that the partnership had in the undertaking, property and assets. Prior to the appointment of the receiver, the partners had, of course, no power to create a security having priority to the registered charge of the appellant. Although the Court appears to have power to create such a charge if it is necessary for the preservation of the property for the benefit of all parties, certainly, notice would have to be given to the appellant of such an application and likely the appellant would have to be made a party to the proceedings: Allan v. Manitoba and North Western R. Co. (1894), 10 Man. R. 143.

The third exception which should be noted is this: If the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. The boundaries of what constitute "necessary costs of preservation" have not been clearly defined in English and Canadian jurisprudence. In Re Oriental Hotels Co.; Perry v. Oriental Hotels Co. (1871), L.R. 12 Eq. 126, a receiver was given priority for "costs of preservation", but the report of the case does not set out what was included in those words. In the subsequent decision in Re Regent's Canal Ironworks Co., Ex p. Grissell (1875), 3 Ch. D. 411, James, L.J., in dealing with a liquidator's claim for priority over debenture holders for moneys paid for preservation of properties said (at p. 427):

> The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.

In Clark On Receivers, vol. 2, s. 640, p. 1078, the law on the point is stated in this way:

> By the great weight of authority the claims against, and the indebtedness incurred by a receiver as a result of his administering the affairs, and even conducting the business of an insolvent concern of a private nature, except where absolutely essential to the preservation of its property, cannot be given priority over the claims of mortgagees or lienholders to the corpus of the property in the absence of consent or estoppel affecting said lienees.
>
> However, preservation costs may be absolutely necessary and be allowed against the lienholders. Preservation of the property from destruction, waste or loss, with or without the mortgagee's consent may include putting a person in charge of the property, as a watchman or otherwise, paying necessary repairs on the property and taxes which would prevent a forfeiture, and necessary insurance.

Counsel for the respondents and for the receiver argued strenuously that the moneys paid by the receiver to the appellant were necessary costs of preservation of the property and hence should be given priority over the appellant's charge. However, in my opinion, the payments cannot be regarded as a necessary cost of preserving the property. In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. The payments in the present case were made primarily for the benefit of the partners, and incidentally for the benefit of the unsecured creditors, but not for the benefit of the appellant. It is true that the appellant received payments on his charge, but the payments were made not to benefit the appellant; rather, they were made to prevent him from taking action to enforce his security.

The payments mentioned in the Regent's Canal case are the type of payments that in my opinion fall within the scope of payments necessary for the preservation of property for the benefit of all interested parties. If, for example, the wind had blown off the roof of the car wash so that the premises were exposed to the elements, the repair of the roof by the receiver to prevent damage to the interior of the premises would have been for the benefit of all parties; and the receiver would have been entitled to priority over the appellant's charge for moneys expended for this purpose. Again, if the receiver had been obligated to pay taxes to prevent a tax seizure, that would have been for the benefit of all parties, including the appellant. But a payment to a mortgagee of sums to which he was legally entitled under his charge, in my judgment, falls in a different category; it is not made to preserve the property for all interested parties but only to preserve the property for a certain group of interested parties; namely, the partners and the unsecured creditors. If the order under appeal is allowed to stand, the appellant will receive little or no benefit from the payments that were made, since the receiver will have priority over his charge for those payments. I do not think, therefore, that the third exception to the general rule has any application to the facts of this case.

To sum up, I can see no basis for granting the receiver priority over the appellant's charge for the sum of $24,043.26 paid by the receiver to the appellant.

The appeal should be allowed with costs, and the order of Holland, J., of December 13, 1974, should be varied by striking out para. 2 thereof.

Appeal allowed.

Registered office

14 (1) A corporation shall at all times have a registered office in Ontario at the location specified in its articles, in a resolution made under subsection (3) or in a special resolution made under subsection (4). 1994, c. 27, s. 71 (4); 2000, c. 26, Sched. B, s. 3 (3).

Idem

(2) The head office of every corporation incorporated prior to the 29th day of July, 1983 shall be deemed to be the registered office of the corporation. R.S.O. 1990, c. B.16, s. 14 (2).

Change of location

(3) A corporation may by resolution of its directors change the location of its registered office within a municipality or geographic township. 1994, c. 27, s. 71 (5).

Change of municipality, etc.

(4) A corporation may by special resolution change the municipality or geographic township in which its registered office is located to another place in Ontario. 1994, c. 27, s. 71 (5).

(5) REPEALED: 2011, c. 1, Sched. 2, s. 1 (3).

Section Amendments with date in force (d/m/y) [+]

Corporate powers

15 A corporation has the capacity and the rights, powers and privileges of a natural person. R.S.O. 1990, c. B.16, s. 15.

Capacity to act outside Ontario

16 A corporation has the capacity to carry on its business, conduct its affairs and exercise its powers in any jurisdiction outside Ontario to the extent that the laws of such jurisdiction permit. R.S.O. 1990, c. B.16, s. 16.

Corporate power

17 (1) It is not necessary for a by-law to be passed in order to confer any particular power on the corporation or its directors. R.S.O. 1990, c. B.16, s. 17 (1).

Power limited by articles, etc.

(2) A corporation shall not carry on any business or exercise any power that it is restricted by its articles from carrying on or exercising, nor shall the corporation exercise any of its powers in a manner contrary to its articles. R.S.O. 1990, c. B.16, s. 17 (2).

Acting outside powers

(3) Despite subsection (2) and subsection 3 (2), no act of a corporation including a transfer of property to or by the corporation is invalid by reason only that the act is contrary to its articles, by-laws, a unanimous shareholder agreement or this Act. R.S.O. 1990, c. B.16, s. 17 (3).

Where notice is not deemed

18 No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed with the Director or is available for inspection at an office of the corporation. R.S.O. 1990, c. B.16, s. 18.

Indoor management rule

19 A corporation or a guarantor of an obligation of a corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that,

(a) the articles, by-laws or any unanimous shareholder agreement have not been complied with;

(b) the persons named in the most recent notice filed under the *Corporations Information Act*, or named in the articles, whichever is more current, are not the directors of the corporation;

(c) the location named in the most recent notice filed under the *Corporations Information Act* or named in the articles, whichever is more current, is not the registered office of the corporation;

(d) a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or does not have authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent;

(e) a document issued by any director, officer or agent of a corporation with actual or usual authority to issue the document is not valid or not genuine; or

(f) a sale, lease or exchange of property referred to in subsection 184 (3) was not authorized,

except where the person has or ought to have, by virtue of the person's position with or relationship to the corporation, knowledge to that effect. R.S.O. 1990, c. B.16, s. 19; 2006, c. 34, Sched. B, s. 3; 2011, c. 1, Sched. 2, s. 1 (4).

Section Amendments with date in force (d/m/y) [+]

20 REPEALED: 2006, c. 34, Sched. B, s. 4.

Section Amendments with date in force (d/m/y) [+]

Contract prior to corporate existence

21 (1) Except as provided in this section, a person who enters into an oral or written contract in the name of or on behalf of a corporation before it comes into existence is personally bound by the contract and is entitled to the benefits thereof. R.S.O. 1990, c. B.16, s. 21 (1).

Adoption of contract by corporation

(2) A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt an oral or written contract made before it came into existence in its name or on its behalf, and upon such adoption,

(a) the corporation is bound by the contract and is entitled to the benefits thereof as if the corporation had been in existence at the date of the contract and had been a party thereto; and

(b) a person who purported to act in the name of or on behalf of the corporation ceases, except as provided in subsection (3), to be bound by or entitled to the benefits of the contract. R.S.O. 1990, c. B.16, s. 21 (2).

Assignment, etc., of contract before adoption

(2.1) Until a corporation adopts an oral or written contract made before it came into existence, the person who entered into the contract in the name of or on behalf of the corporation may assign, amend or terminate the contract subject to the terms of the contract. 2011, c. 1, Sched. 2, s. 1 (5).

Non-adoption of contract

(3) Except as provided in subsection (4), whether or not an oral or written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit. R.S.O. 1990, c. B.16, s. 21 (3).

Exception to subs. (1)

(4) If expressly so provided in the oral or written contract referred to in subsection (1), a person who purported to act in the name of or on behalf of the corporation before it came into existence is not in any event bound by the contract or entitled to the benefits thereof. R.S.O. 1990, c. B.16, s. 21 (4).

Section Amendments with date in force (d/m/y) [+]

Court File No.: CV-17-588051-OOCL

FIRSTONTARIO CREDIT UNION LIMITED APPLICANT	AND	FERWIN VENTURES CAPITAL INC. RESPONDENT

SUPERIOR COURT OF ONTARIO
(Commercial Court)

Proceedings Commenced at:

TORONTO

FACTUM AND BOOK OF AUTHORITIES OF ANTONIO AND MALGORZATA DI DOMIZIO

MURRAY N. MALTZ
Murray Maltz Professional Corporation
Barrister & Solicitor
933 Mount Pleasant Road
Toronto, Ontario
M4P 2L7
Tel: (416) 398-6900
Fax: (416) 398-6845
LSUC #25047R
Solicitor for Antonio and Malgorzata
Di Domizio